In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1174

TIME, INC.,
Petitioner,

vs.

MICHAEL S. VIRGIL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Subject Index

Table of Authorities Cited

Cases

Constitutions

Statutes

Texts

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I

PRELIMINARY STATEMENT

Throughout its petition, Time, Incorporated (hereinafter "Time"), openly recognizes and concedes that the First Amendment does not preclude liability for any and all truthful invasions of privacy. It concedes that some privacy tort actions are cognizable ". . . in order to preserve a proper balance between the rights of the individual and the rights of the press." [Petition, at page 3.] The issues upon which Time focuses, then, relate to the standard of liability for the tort

of invasion of privacy and the role of the jury in applying that standard. As will be shown, the rulings of the District Court and the Ninth Circuit below (and California law upon which they are based) correctly reflect the principles articulated and applied by this Court in analogous First Amendment decisions. The grant of certiorari is thus not appropriate. This case was filed in 1971 nearly five years ago and the pretrial appellate process has already caused great delay and prejudice to plaintiff-respondent Michael S. Virgil ("Virgil"). Denial of certiorari will permit the case to proceed to a trial in which the facts and issues can be more fully developed so as to provide a more complete record for the resolution of the constitutional and tort issues involved.[1]

II

THE NATURE OF THE PRESENT CASE

The present case is a tort action filed by respondent Virgil against petitioner Time arising out of the publication of an article in Sports Illustrated on February 22, 1971. Virgil alleges that Time, by publication of certain of the personal facts stated in the article, has maliciously invaded his privacy by in-

[1]In this respect, see the dissenting opinion of Mr. Justice Rehnquist in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029 at pages 1053-1054 and cases there cited. This Court should not review a case and anticipate a question of constitutional law in advance of the necessity of deciding it. This principle is particularly compelling in a case such as ours where a more complete factual and evidentiary development could clarify the legal-constitutional issues involved.

trusion upon plaintiff's seclusion, solitude or private affairs [see: Prosser, Law of Torts (4th ed. 1971) at pages 804-814; *Dietman v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969)] and by public disclosure of embarrassing personal private facts concerning him. [See: *Briscoe v. Readers Digest Association, Inc.*, 4 Cal.3d 529, 483 P.2d 34 (1971).] Virgil has also alleged a claim against respondent for intentional infliction of emotional distress.

The State of California, through its highest Court, has articulated a policy in favor of protecting an individual's justified expectations of privacy.[2] Moreover, the California courts have recognized the plaintiff's right to trial by jury in such tort actions. As will be shown, Time's assertions that the standards governing such invasion of privacy actions and the right to trial by jury in such cases impair protected First Amendment publications are wholly without merit.

The rules and principles formulated by the California courts and by the Ninth Circuit below offer the maximum amount of judicial protection for publications consistent with an individual's interest in privacy and his constitutional right to trial by jury in vindicating improper invasions of that privacy.

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[2]That the tort of invasion of privacy is but one manifestation of the State of California's enthusiastic and laudatory commitment to protection of privacy is evidenced by the recent adoption by the voters of California of a state constitutional amendment guaranteeing the right of privacy as an "inalienable right" for all individuals. California Constitution, Article I, Section 1; see also *White v. Davis*, 13 Cal.3d 757, 533 P.2d 222 (1975).

As will be demonstrated herein, the ruling of the Ninth Circuit below, particularly in its reliance on *Briscoe, supra,* does not undermine the freedom of press or the right of the press to publish newsworthy events. Rather, the Court below rejects petitioner Time's near absolutist view of the publisher's right and recognizes that—as in other First Amendment contexts—a jury is the proper fact-finder in the first instance for determining crucial facts relevant to the issue of whether or not a speech or publication is constitutionally protected.

In its petition, Time makes the unsupported and unsupportable statement that it would be "pernicious to freedom of the press" to permit "after-the-fact determinations of judges and juries as to what facts the public 'is entitled' to have and what facts the public should not have because they are 'offensive'" [Petition, p. 11]. Through this statement, Time shows its true colors. It rejects the right of any court—judge or jury—to restrict its right to publish "true" facts—irrespective of the newsworthiness or the extent to which those facts which are private and personal constitute an "offensive" and unjustified invasion of a plaintiff's proper expectations of privacy. In short, petitioner Time is, in reality, requesting this Court to abolish the tort of invasion of privacy in the area of publication of personal, private facts which are true. For if the existence of such a tort is recognized (as Time elsewhere in its petition concedes), then "after-the-fact determinations of judges and juries" must be made as to whether a truthful

publication improperly invaded a plaintiff's protected interest in privacy. [See the opinion of the Court of Appeals below, 527 F.2d at p. 1128.]

Indeed, such "after-the-fact" determinations have been common and permissible in other First Amendment cases before this Court. A jury or judge will often be called upon, after a speech, to determine whether the speaker created a clear and present danger of a riot or breach of peace [see, e.g., *Feiner v. New York,* 340 U.S. 315 (1951)], or an interference with the peaceful and orderly functions of a classroom or school session [*Grayned v. Rockford,* 408 U.S. 104 (1972)], or whether he uttered or published offensive "fighting words" [*Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942)], or "obscenity" [*Miller v. California,* 413 U.S. 15 (1973)], or whether the publication constituted such an abuse of governmental processes as to violate antitrust laws [*California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972)].

In each of the above-cited cases and others too numerous to cite, this Court has ruled that a speaker or publisher may speak out on whatever subject he or she chooses. The Court is most reluctant to allow any prior restraint on the speech [*New York Times Co. v. United States,* 403 U.S. 713 (1971)]. But if that speech or publication becomes the basis of an "after-the-fact" civil or criminal action, then a court (and most often a jury) will be required to decide whether the speech or publication falls within the protected area of the First Amendment or whether it violates

a state or private interest which justifies imposition of civil or criminal sanctions.

The rulings of the District Court and Court of Appeals below, then, follow the established and unbroken line of above-cited decisions by this Court.

III

THE SCOPE OF THE INVASION OF PRIVACY IN THE PRESENT CASE

Inasmuch as this case comes before the Court in the posture of a review of Time's motion for summary judgment, the facts of the case must be appraised in the light most favorable to respondent Virgil. *United States v. Diebold, Inc.,* 369 U.S. 654 (1962); *Poller v. C.B.S.,* 368 U.S. 464, 473 (1962); *Goldwater v. Ginzburg,* 414 F.2d 324, 337 (2d Cir. 1969), *cert. denied* 396 U.S. 1049 (1970). The facts of the case were stated by the District Court and Court of Appeals below. (See Petition, Appendix A, pages A2-A4; and Appendix C, pages C1-C5.)

In an article which appeared in the February 22, 1971, issue of *Sports Illustrated Magazine* entitled "The Closest Thing to Being Born," petitioner briefly mentioned the respondent's prowess as a body surfer and then launched into a long article setting forth intimate details about respondent's private life that had nothing to do with the sport of body surfing. Throughout the article, it described Virgil as a "wild man" and "animal" and in general characterized him as "being abnormal." It also sets forth many other embarrassing private facts about his early life such

as: the fact that he allegedly extinguished cigarettes in his mouth; deliberately burned holes in his hands; dove headfirst down stairs to impress girls; that he ate insects off the wall and floor; that he, in a fit of anger, bit off a Negro's cheek; and that while a youth, he dove off billboards to deliberately injure himself so that he could collect unemployment compensation.

Virgil contends that these facts, even if true, were fraudulently obtained, and that the publication of these characterizations of Virgil is an unwarranted invasion of his right to privacy, and that petitioner has intentionally inflicted upon respondent emotional distress; further, Virgil contends that all of these acts were done maliciously by petitioner.

The evidence will show that petitioner obtained much of this information from acquaintances of Virgil's. Moreover, the personal information which the reporter pried from Virgil himself was given under an expectation of privacy. The complaint alleges, and the Court must accept as true for purposes of Time's summary judgment motion, that Virgil believed that his name would be used only in connection with identifying him as a body-surfer (the subject matter of the article). Virgil was unaware that the article's coverage of him would emphasize personal and embarrassing incidents of his adolescence. As stated in the opinion of the District Court, below (see Petition, Appendix C, page C7): "The complaint further alleges that the plaintiff never consented to the publication of any facts 'pertaining to his personal life or personal characteristics.'"

IV

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

A. THE STANDARDS FOR DEFINING THE TORT OF INVASION OF PRIVACY AS ARTICULATED BY THE COURT BELOW—AS WELL AS THE RULINGS OF THE CALIFORNIA SUPREME COURT—ARE CONSISTENT WITH THIS COURT'S PRIOR RULINGS IN ANALOGOUS FIRST AMENDMENT CASES.

Petitioner Time raises numerous speculative "reasons" as to why the standards for invasion of privacy actions, as articulated by the courts below, jeopardize the First Amendment freedoms of speech or press. The fears and forecasts of doom are fantasized or—at best—gross exaggerations espoused by a publishing company which would have this Court define as "newsworthy" anything which the media decides to publish. That view of "newsworthiness" has been rejected by this Court. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and, more recently, *Time, Inc. v. Firestone*, ... U.S. ....., 96 S.Ct. 958, 965 (1976). Let us look more closely at the standard which the California Supreme Court (which, it must be recognized, is a court that has been most willing to afford protection to First Amendment freedoms) and the Court below have developed.

Contrary to petitioner Time's argument, the Court of Appeals below did not rule that a publisher could be liable for publication of newsworthy truthful facts.[3] Indeed, the crux of the Court of Appeals opin-

[3]Petitioner's argument (at pages 11-12) that the Court of Appeals relied on an outdated draft of the Restatement of Torts is wholly without merit. Indeed, the Court below relied on Tentative Draft No. 21 (1975) throughout its opinion and emphasized

ion is that a publisher has a First Amendment right to report any and all truthful facts, including private personal facts about an individual, which are newsworthy. In so ruling, the Court below expressly followed this Court's recent ruling in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

Petitioner's repeated suggestion that the ruling of the Court of Appeals below subjects it to liability for publication of truthful newsworthy facts is so erroneous as to border on a dishonest characterization of the Ninth Circuit's opinion. Time and time again, the Court of Appeals makes it clear that a publisher cannot be liable for publication of truthful, newsworthy facts. For example:

> "To test the validity of such a rule, we might start with the public's right to know under the First Amendment. Does the spirit of the Bill of Rights require that individuals be free to pry into the *unnewsworthy private affairs* of their fellowmen? In our view it does not." 527 F.2d at page 1128. [Emphasis added.]

And further:

> "We conclude that unless it be privileged as *newsworthy* . . . The publicizing of private facts is not protected by the First Amendment." 527 F.2d at page 1128. [Emphasis added.]

that the 1975 draft precluded liability for any truthful publication of newsworthy facts. The Court went even further and ruled that the 1975 draft embodied a constitutional standard dictated by the First Amendment. [See 527 F.2d at pp. 1128-1129.] Commentary from the older Restatement Draft No. 13 (1967) was used merely for purposes of illustration, the Court noting that it used only those illustrations from the 1967 draft which were not substantively changed by the newer 1975 draft. [See footnote 10 of the Court of Appeals opinion, 527 F.2d at p. 1129.]

And finally:

> "The privilege to publicize newsworthy matters is included in the definition of the tort set out in Restatement . . . . Liability may be imposed for an invasion of privacy only if 'the matter publicized is of a kind which . . . is not of legitimate concern to the public.'" 527 F.2d at pages 1128-1129.

Thus, it is clear that the Court of Appeals below recognized that the First Amendment establishes constitutional protection for the publication of truthful, newsworthy facts even if such are embarrassing to a private plaintiff. If, as respondent Virgil contends in our present case, the facts publicized are not newsworthy or related to a public official or public figure or derived from public records, then an invasion of privacy action is not precluded by the First Amendment. As the Ninth Circuit so accurately observed: "In our view fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be acceptable." 527 F.2d at page 1128.

This Court has taken a similar view in refusing to apply the strict standards of *New York Times v. Sullivan,* 376 U.S. 254 (1964), to private defamation actions brought by nonpublic figures and nonnewsworthy plaintiffs. *Gertz v. Welch, Inc.,* 418 U.S. 323 (1974); *Time, Inc. v. Firestone, supra.* In *Gertz* and *Firestone,* just as in our present case, the publishers took the view that the individual who was the subject matter of the publication was newsworthy or a public figure. In both cases this Court disagreed.

Respondent Virgil and his past life are even less newsworthy than the plaintiffs and their activities in *Gertz* and *Firestone.* The article in *Gertz* purported to be based in part on a murder trial of a Chicago police officer. 418 U.S. at pages 325-326. The article in *Firestone* purported to be a direct report of a judicial proceeding. 96 S.Ct. at pages 965-967. In *Firestone* this Court nevertheless specifically rejected the view that the First Amendment requires deference to the editorial judgment of the publisher in defining what is newsworthy:

> ". . . petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971) . . . . In *Gertz,* however, the Court repudiated this position stating that 'extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge a legitimate state interest to a degree that we find unacceptable. 418 U.S. at 346." See *Firestone,* 96 S.Ct. at page 965.

Just as deference to the publisher's editorial judgment as to whom or what is "newsworthy" would unduly abridge the state's legitimate interest in protecting private reputations from defamation, so also would it impair the states' interest in protecting the right of individual privacy from unwarranted and unjustified invasion. This is an interest recognized by all but a few jurisdictions in the United States.[4]

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[4] *Time, Inc. v. Hill,* 385 U.S. 374, 383 (1967); *Cox Broadcasting Corp. v. Cohn,* 95 S.Ct. at p. 1043.

In *Cox Broadcasting Corp. v. Cohn, supra,* this Court recognized the ". . . impressive credentials for a right of privacy." 95 S.Ct. at page 1043. The importance of the "right to be let alone" as articulated in the celebrated article by Warren and Brandeis, The Right of Privacy, 4 Harv.L.Rev. 193 (1890), and echoed and embellished by an impressive array of legal scholars since cannot be ignored. The right of privacy has been recognized as creating a zone of privacy which protects each individual from unwarranted intrusions by the government, the press and other private entities.[5]

As mentioned earlier herein, California has been particularly concerned with protecting individuals from invasions of privacy by government and the private sector. California Constitution, Article 1, Section 1 (defining privacy as an "inalienable right"); *White v. Davis,* 13 Cal.3d 757, 533 P.2d 222 (1975); *Melvin v. Reid,* 112 Cal.App. 285 (1931). In *Briscoe v. Readers Digest Ass'n., Inc., supra,* the Supreme Court of California recognized that the tort action

[5]See the authorities cited in Mr. Justice White's opinion for the Court in *Cox Broadcasting Corp. v. Cohn, supra,* 95 S.Ct. at pages 1042-1043. See also: *Griswold v. Connecticut,* 381 U.S. 479 (1965); Prosser, Law of Torts (4th Ed., 1971), 804-814; Prosser, Privacy, 48 Calif.L.Rev. 383, 389 (1960); Westin, Privacy and Freedom (1967); Gross, The Concept of Privacy, 42 N.Y.U.L.Rev. 34 (1967); Nimmer, The Right to Speak From *Times* to *Time,* 56 Calif.L.Rev. 935, 958-959 (1968): "The right of privacy protects not reputation, but the interest in maintaining the privacy of certain facts. Public disclosure of such facts can create injury regardless of whether such disclosure affects the subject's reputation. *The injury is to a man's interest in maintaining a haven from society's searching eye* . . . . 'The gravamen in the public disclosure cases [privacy] is degrading a person by laying his life open to public view.'" (Citing Bloustein, Privacy As an Aspect of Human Dignity, 39 N.Y.U.L.Rev. 962, 981 (1964).

for invasion of privacy must be reconciled with First Amendment freedoms of speech and press. In *Briscoe,* the Court noted that the right to privacy is an integral component for the protection of human dignity and that the need for this protection increases as our society grows more crowded and complex:

> "Acceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices . . . capacity to destroy an individual's anonymity, intrude upon his most intimate activities and expose his most personal characteristics to public gaze." 4 Cal.3d at page 533.

Nevertheless, while recognizing that the tort of invasion of privacy protected important and significant interests and has been established in California since 1931 (see *Melvin v. Reid, supra*), the *Briscoe* court explicitly noted that privacy must give way as to matters of "public or general interest," citing Warren and Brandeis, *supra,* 4 Harv.L.Rev. at page 214. In this respect, publications are not limited to public officials or figures but rather:

> "Freedom of discussions must embrace all issues about which information is needed or appropriate to enable a society to cope with the exigencies of their period . . . . [citing *Thornhill v. Alabama,* 310 U.S. 88 (1940), and *Time, Inc. v. Hill, supra*]. The scope of the privilege thus extends to reporting of *recent events,* even though it involves publication of a purely private individual's name or likeness [citing, *inter alia, Winters v. New York,* 333 U.S. 507 (1948)]." 4 Cal.3d at page 535. [Emphasis added.]

The *Briscoe* case, like our present one, involved publication of highly personal and very embarrassing facts about the plaintiff which occurred many years in the past. [In *Briscoe,* that plaintiff had been involved in and convicted for a hijacking offense eleven years earlier.] In our present case, as in *Briscoe,* the plaintiff had attempted to put his past behind him, to adapt to and pursue his present role as a family man and a respected member of his community, social and religious organizations. The unwanted and unjustified publicity concerning respondent Virgil's adolescent escapades interfered with these proper pursuits.

The private nature of the facts involved and their lack of newsworthy value are even more clear in our case than in *Briscoe, Gertz* or *Firestone.* For here, the article was not a report based on public records which contained the name of the plaintiff. Compare: *Cox Broadcasting Corp. v. Cohn, supra.*

The California standard for invasion of privacy suits, as refined by the Court of Appeals opinion below, thus establishes maximum leeway for free press consistent with the recognition of the legitimate state interest in protecting the privacy of citizens. That standard prohibits liability for publication of newsworthy facts, or of matters pertaining to public officials or public figures, or for references to the identity of or facts about an individual which are contained in judicial or other public records.[6] The *Briscoe* court went on to establish guidelines for the jury to consider in defining whether a publication is newsworthy:

> "We have previously set forth criteria for determining whether an incident is newsworthy. We consider '[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety. [Citations.]' (*Kapellas v. Kofman,* 1 Cal.3d 20, 36 [81 Cal.Rptr. 360, 459 P.2d 912].)" [4 Cal.3d at page 541.]

Finally, to insure maximum protection for freedom of the press, the *Briscoe* court requires a plaintiff, in order to successfully maintain an invasion of privacy action, to prove that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive. 4 Cal.3d at pages 542-543.

Inasmuch as the Court of Appeals below adopted all of the First Amendment protections of the *Briscoe* opinion as well as those added in *Cox Broadcasting Corp. v. Cohn, supra,* the standard developed complies with First Amendment precedents, principles and policies as developed by this Court. Accordingly, Time's petition for a writ of certiorari should be denied.

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[6] While this latter limitation was not expressly spelled out in the *Briscoe* opinion, it clearly was included in the ruling of the Ninth Circuit Court of Appeals in our present case as is demonstrated by that Court's citation of and reliance upon *Cox Broadcasting Corp. v. Cohn, supra.* See *Virgil* opinion, 527 F.2d at page 1127.

B. THE COURTS BELOW PROPERLY RECOGNIZED THAT THE STANDARD FOR INVASION OF PRIVACY LIABILITY SHOULD, WHERE THERE ARE GENUINE ISSUES OF FACT, BE APPLIED IN THE FIRST INSTANCE BY THE JURY.

As previously stated, petitioner Time's argument that the jury must not be allowed to resolve constitutional facts relevant to determining First Amendment questions fails to recognize the numerous decisions of this Court to the contrary. Thus, juries must find whether a speech or publication constituted a clear and present danger of breach of peace, or interference with school sessions or interference with the administration of justice. See *Feiner v. New York, supra; Grayned v. Rockford, supra; Craig v. Harney,* 331 U.S. 367 (1947). Juries decide, in the first instance, whether a publication is obscene. *Miller v. California, supra.* Indeed, under *New York Times v. Sullivan, supra,* and its progeny, a jury is to determine whether a defendant published material with "actual malice" (i.e., knowledge that it was false or reckless disregard for its truth or falsity).

Of course, the juries' findings in such cases are referred to as "constitutional facts" and the trial court and appellate courts have the power to review such findings and set them aside if they improperly abridge First Amendment freedoms. See, e.g., *Edwards v. So. Carolina,* 372 U.S. 229 (1963); *Jenkins v. Georgia,* 418 U.S. 153 (1974).

The Court of Appeals, below, recognized that the determination of newsworthiness takes into account community standards as to when the information published is of public interest as opposed to when

it is an unjustified offensive prying into a plaintiff's private life. 527 F.2d at page 1129. This concept of offensiveness is one which is a component of the California law on invasion of privacy, see *Briscoe v. Readers Digest Ass'n., Inc., supra,* as well as being central to this Court's guidelines for privacy actions. See *Time, Inc. v. Hill,* 385 U.S. at p. 383:

> "This limitation to newsworthy persons and events does not of course foreclose an interpretation . . . to allow damages where 'revelations may be so intimate and unwarranted in view of the victim's position as to outrage the community's notions of decency.'"

The Court of Appeals thus recognized that the appraisal of community standards is a role which is best filled, in the first instance, by the jury (citing *Miller v. California, supra*), subject to close judicial scrutiny (citing *Jenkins v. Georgia, supra*). 527 F.2d at page 1129.

In its petition (at page 16), Time cites numerous cases in which this Court has ruled against a publisher's liability for defamation as a matter of law. Neither the respondent nor the opinion of the Court of Appeals below dispute the point that there are many cases in which issues as to defamation, falsity, actual malice and the like can be ruled on as a matter of law. Similarly, there will be cases in which the newsworthy value of a fact or person can be determined as a matter of law. [See, e.g., *Cox Broadcasting Corp. v. Cohn, supra.*] If such an inquiry was to be made in our case, it would seem that the Court should

find that respondent Virgil's past activities were not newsworthy in that he was less of a public figure and his past conduct was of less public interest than that of the plaintiffs in *Gertz* and *Firestone*. However, the point is that such determinations should be left to the jury. As this Court stated in *Time, Inc. v. Hill, supra,* 385 U.S. at page 391:

> "Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or merely negligent mistatement by Life, or a finding that Life portrayed the play as a re-enactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false."

Most recently in *Time, Inc. v. Firestone, supra,* this Court once again upheld the role of the jury in determining liability for publication of false and defamatory information. Indeed, the Court deferred to the jury determination that Time's interpretation of a complex and ambiguous divorce decree was false even though if that interpretation had been true, the publication would have been protected by the First Amendment. 96 S.Ct. at page 967:

> "In its view the Time article faithfully reproduced the precise meaning of the divorce judgment. But this issue was submitted to the jury under an instruction intended to implement Florida's limited privilege for accurate reports of judicial proceedings, App. 509; see 305 So.2d at 177. By returning a verdict for respondent *the jury necessarily found that the identity of meaning which petitioner claims does not exist even for laymen.* The Supreme Court of Florida upheld this finding on appeal, rejecting petitioner's contention that its report was accurate as a matter of law. Because demonstration that an article was true would seem to preclude finding the publisher at fault, see *Cox Broadcasting Co.,* 420 U.S., at 498-500, 95 S.Ct., at 1047 (Powell, J., concurring), we have examined the predicate for petitioner's contention. We believe the Florida courts properly could have found the "Milestones" item to be false." [Emphasis added.]

The above-quoted passage establishes this Court's recognition of the role of the jury in First Amendment cases, particularly where the jury determination involves consideration of community standards and the impact of an article on or its interpretation by laymen.

In *Briscoe,* the California Supreme Court identified the questions for jury determination as follows (4 Cal.3d at page 543):

> "We do not hold today that plaintiff must prevail in his action. It is for the trier of fact to determine (1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed."

The questions for the jury in our case are similar except, of course, that plaintiff-respondent Virgil is not a former convicted criminal. Nevertheless, the

jury would be called upon to decide whether Virgil had reformed from his adolescent ways, whether the re-counting of his past exploits was highly offensive and injurious to the reasonable person, and if so, whether publication was with reckless disregard (actual malice) as to its offensiveness. Submitting these questions to the jury in privacy cases is no more endangering to First Amendment freedoms than submitting issues of falsity, defamatory meaning and reckless disregard (actual malice to juries in libel cases under the *New York Times* line of cases. See *Time, Inc. v. Firestone, supra,* 96 S.Ct. at page 967.

Finally petitioner Time seems to argue that this Court should not trust juries to faithfully resolve the issues here presented. The suggestion is that a jury, under the cloak of anonymity of the general verdict, will censor protected publications. This argument has already been shown to be fallacious; juries commonly resolve factual issues in speech cases and the special scrutiny which trial and appellate courts give to findings of constitutional facts insures that the jury verdict will not be a shield for censorship of speeches and publications protected by the First Amendment. See *Jenkins v. Georgia, supra.*

In addition, this Court has recently recognized that the Seventh Amendment right to trial by jury could not be denied on the basis of one party's speculative fear that a jury is unable or unwilling to perform its duty. *Curtis v. Loether,* 415 U.S. 189 (1974). In *Curtis,* this Court ruled that parties in federal litigation had a constitutional right to trial by jury in an

action sounding in tort (there an action under Section 812 of the Civil Rights Act. 42 U.S.C. §3612). Just as Time here argues that the jury may abuse its power by finding liability for protected speech, petitioner in *Curtis* argued that racially discriminatory jurors could abuse their power by improperly denying civil rights claims. Mr. Justice Marshall, for a unanimous Court, responded in favor of trial by jury (415 U.S. at page 198):

> "We are not oblivious to the force of petitioner's policy arguments . . . . We recognize, too, the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled. Of course, the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or to grant a new trial provides substantial protection against this risk, and respondents' suggestion that jury trials will expose a broader segment of the populace to the example of the federal civil rights laws in operation has some force. More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment."

Thus, the opinion of the Court of Appeals in our case correctly reflects concern for the First Amendment freedoms, as well as respondent Virgil's right to seek a remedy for alleged invasion of privacy through his constitutional right to trial by jury. The opinion of the Court of Appeals and the law of California upon which it is based are consistent with the governing principles of First Amendment law as reflected in prior decisions of this Court. Therefore,

the petition for writ of certiorari should not be granted in this case.

Petitioner Time suggests that the ruling of the Ninth Circuit Court of Appeals below conflicts with *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970) and *Bon-Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970). However, neither of those cases involved invasion of privacy actions; and both are in conflict with other rulings in their own respective circuits. For example, the Fifth Circuit has recognized the role of the jury in libel cases. See *Time, Inc. v. McLaney*, 406 F.2d 565, 572 (5th Cir. 1969). And in the area of privacy, the District of Columbia Circuit sitting *en banc*, has recognized that a tort action for invasion of privacy is not precluded by the First Amendment. See *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966), a case cited by and relied upon by the Court of Appeals, below. (Petition, Appendix A, page A-11.)

Thus, petitioner is unable to show a conflict in the Circuits concerning the existence of the tort of invasion of privacy or the role of the jury in determining liability in the first instance. To the extent that the *Wasserman* and *Bon-Air Hotel* cases take a different view on the role of the jury in defamation cases, those decisions are inconsistent with the rulings and governing principles enunciated by this Court. Review by Certiorari should be reserved for cases such as *Wasserman*, *Bon-Air Hotel* or their progeny and not for our present case which carefully follows the precedents and principles established by this Court.

V

CONCLUSION

For the reasons stated above, this Honorable Court should deny Time, Inc.'s petition for Writ of Certiorari and allow the litigation below, which has already been delayed for nearly five years by the present pre-trial appeal, to proceed.

Dated, April 30, 1976.

Respectfully submitted,

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